Nos. 17-1717 & 18-18

In the Supreme Court of the United States

THE AMERICAN LEGION, ET AL.,
Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE TOWN OF TAOS, NEW MEXICO AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a 93-year-old memorial to the fallen of World War I is unconstitutional merely because it is shaped like a cross.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Town of Taos is a small community in the mountains of northern New Mexico famed for its thriving artistic community and historic landmarks. Taos also has a proud history of service in the Nation's defense, one which it would like to continue honoring as it has for decades. Taos maintains a war memorial in its town plaza dedicated to its sons who sailed across the Pacific to fight during the Second World War, and dedicated in particular to the nearly half of whom were killed during the Battle of Bataan, the infamous Bataan Death March, or in the subsequent years of Japanese captivity. Because this memorial includes a bronze cross, however, Taos was recently threatened with a lawsuit for allegedly violating the Establishment Clause. The ability of the Taos community to honor their war dead in the somber and respectful way they have done for more than fifty years is under threat, and the decision below, if allowed to stand, will likely lead to the removal or destruction of not only the Taos memorial, but previously noncontroversial memorials and public art installations throughout the country.

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest legal foundation organized

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[1] Pursuant to Supreme Court Rule 37(2)(b), all parties have given blanket consent for the filing of amicus briefs. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been involved in numerous cases seeking to protect Americans' civil liberties, as well as numerous cases seeking to protect the ability of Western individuals and communities to govern themselves without unreasonable government interference. Because the decision below presents an imminent threat to those values, MSLF respectfully submits this amicus curiae brief in support of Petitioners on behalf of the Town of Taos.

INTRODUCTION AND SUMMARY OF ARGUMENT

Forty-nine soldiers from Prince George's County, Maryland died in the First World War. As a way of honoring these men's sacrifice, The American Legion and a committee of war mothers organized the construction of the Bladensburg Peace Cross shortly after the end of the war. The memorial is a forty foot-tall Celtic-style Latin cross standing on a large pedestal. The symbol of the American Legion is displayed at the center of the cross, while the words "valor," "endurance," "courage," and "devotion" are carved into the base. On the pedestal is affixed a plaque listing the names of the fallen soldiers, as well as an inscription reading "DEDICATED TO THE HEROES OF PRINCE GEORGE'S COUNTY,

MARYLAND WHO LOST THEIR LIVES IN THE GREAT WAR FOR THE LIBERTY OF THE WORLD," followed by a quote from President Wilson.

While the memorial was conceived, financed, and constructed by private entities, the cross and the land on which it stands were deeded to the Maryland-National Capital Park and Planning Commission in 1961 because the State had determined that new road construction and an increase in traffic meant that it was no longer safe for the American Legion to own what had become the median of a busy intersection. This change in ownership, however, did not materially affect the memorial's uses, as the Bladensburg community continues to use the memorial as a site to commemorate holidays like Veterans Day and Memorial Day.

In 2012, the American Humanist Association initiated this action by filing a complaint alleging that the memorial violates the First Amendment's Establishment Clause—the first such complaint in the memorial's ninety-year history. The District Court held the memorial constitutional, but was reversed 2–1 by the Court of Appeals for the Fourth Circuit. The Fourth Circuit panel held that the cross's "inherent religious meaning" "easily overwhelm[ed]" the government's admittedly "legitimate secular purposes for displaying and maintaining" it. American Legion App. 16a–18a, 22a. The Fourth Circuit then denied *en banc* review, again over vigorous dissent, and Petitioners appealed, seeking this Court's review.

The Fourth Circuit's decision was wrong and should be reversed both because it is in direct conflict with the original public meaning of the Establishment

Clause, and because allowing its reasoning to stand poses a grave threat to beloved and historically important memorials, monuments, and other pieces of public art throughout the United States.

Unfortunately, the Fourth Circuit's erroneous decision is a symptom of a larger problem: this Court's Establishment Clause jurisprudence has become hopelessly unmoored from the plain text and historical context of the Constitution. A series of plurality opinions that provided more questions than answers, built on the notoriously unworkable test developed in *Lemon v. Kurtsman*, 403 U.S. 602 (1971), itself a product of what Chief Justice Rehnquist referred to as "a metaphor based on bad history, a metaphor which has proved useless as a guide to judging," *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting), have turned the law of the Establishment Clause into a confused morass of conflicting tests. This Court desperately needs to return to the text of the Constitution, as originally understood, to bring some sense of order and consistency to this area of the law.

Reversal by this Court is also necessary due to the significant and widespread damage that the Fourth Circuit's reasoning may cause throughout the country. The virtually *per se* rule of unconstitutionality for large displays of the cross due to its long association with Christianity set down by the Fourth Circuit puts a great many beloved objects and installations at risk. Amicus, the Town of Taos, New Mexico has already been threatened with a lawsuit over its memorial to local men who fought and died in the Battle of Bataan and subsequent Death March, and the Fourth Circuit's reasoning likely

extends far beyond monumental crosses to all kinds of publicly owned objects bearing religious imagery. The founding generation would be shocked and outraged that the Constitution—their greatest accomplishment, for which every American remains eternally indebted—would someday be twisted to deny local communities the right to honor their dead in the way they find most meaningful.

ARGUMENT

I. THE COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE HAS BECOME HOPELESSLY UNMOORED FROM THE CONSTITUTION'S ORIGINAL MEANING

Contemporary jurisprudence concerning the Constitution's Establishment Clause is, in a word, confused. Criticized by legal scholars, lower court judges, and even members of this very Court, the unclear and sometimes contradictory rules governing how courts should address Establishment Clause issues have been described as "murky," *Freethought Soc. of Greater Phila. v. Chester County*, 334 F.3d 247, 256 (3d Cir. 2003), "muddled," *Bauchman v. W. High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997), and "flawed in its fundamentals and unworkable in practice." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 669 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part). Each of the various tests this Court has developed over the years have proven difficult for

lower courts to apply—when they are even able to determine which test ought to apply in the first place.

Unfortunately, Establishment Clause jurisprudence has become completely untethered from the original public meaning of the Constitution's text. When the Framers drafted—and the People ratified—the First Amendment, they were doing so within a specific intellectual and historical context attempting to solve particular political problems. A proper interpretation of the Establishment Clause must consider this context to comport with the Clause's original meaning to provide adequate guidance to potential future litigants. This Court should thus reject the myriad competing tests it has devised but struggled to apply over the past few decades and adjudicate the present controversy with a fresh analysis of the text and context of the First Amendment.

This Court's modern Establishment Clause jurisprudence effectively began with *Everson*, a case concerning whether a New Jersey law that reimbursed parents for the costs of transporting their children to parochial schools violated the First Amendment, and in which the majority staked out an aggressive theory of the Clause, based largely on Thomas Jefferson's infamous statement that the Establishment Clause erects "a wall of separation between Church and State." *Everson v. Board of Ed. of Ewing Tp.*, 330 U.S. 1, 15–16 (1947) (quoting Letter from Thomas Jefferson to the Danbury Baptist Association (Jan 1, 1802), http://

www.loc.gov/loc/lcib/9806/danpre.html).[2] The Court relied heavily on the mistaken belief that the First Amendment matched entirely the views of Jefferson and Madison, as laid out in the Virginia Bill for Religious Liberty and Madison's *Memorial and Remonstrance Against Religious Assessments*, with almost no discussion whatsoever of the Constitutional Convention, the First Congress, or the words of non-Virginians. *See Everson*, 330 U.S. at 8–14. Practically from day one, this Court's Establishment Clause jurisprudence has been built on "a metaphor based on bad history, a metaphor which has proved useless as a guide to judging." *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting).

In the years following *Everson* this Court experimented with a handful of vague standards before settling on the basic test in use today in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In *Lemon*, the Court considered a pair of state statutes authorizing payments in support of religiously affiliated schools, and unanimously held that this provision of direct aid

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[2] Then-Associate Justice Rehnquist succinctly described the problems with relying on Jefferson's letter as an explication of the original meaning of the Establishment Clause thusly:

> Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Wallace, 472 U.S. at 92 (Rehnquist, J., dissenting).

violated the Establishment Clause. *Id.* at 625. In coming to its conclusion, the Court formulated the now-ubiquitous three-part *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612–13 (internal citations omitted).

The consensus around the *Lemon* test—to the extent one existed in the first place[3]—quickly began to fray, as this Court struggled to adapt the *Lemon* factors to different factual scenarios. A series of closely divided decisions defined by narrow pluralities has haunted Establishment Clause jurisprudence ever since, with different circuits disagreeing over which test rightfully applies to any given dispute. *See, e.g., ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 777–78 n.8 (8th Cir. 2005) (*en banc*) (applying Justice Breyer's legal judgment test from his concurrence in *Van Orden v. Perry*, 545 U.S. 677, 698–705 (2005)); *ACLU v. Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005) (applying the endorsement test from *County of Allegheny*, 492 U.S. 573 at 599.

The present dispute offers a good example of the confusing mess that modern Establishment Clause jurisprudence has become. In its denial of rehearing en banc, the Fourth Circuit below used the *Lemon*

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[3] While seven justices signed onto Chief Justice Burger's opinion, five of them qualified their agreement by signing onto one of the three concurring opinions.

framework as filtered through the Tenth Circuit's decision in *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010); *See* Pet. App. 90a–91a. Petitioners, meanwhile, argue that the test for "passive displays" from *Van Orden v. Perry*, 545 U.S. 677 (2005), or the "historical practices and understandings" test from *Town of Greece v. Galloway*, 572 U.S. 565 (2013), applies. American Legion Petition for Writ of Certiorari at 11–14; Maryland-National Capital Park and Planning Commission Petition for Writ of Certiorari at 12–21. The field is so jumbled that Petitioners were forced to brief three separate arguments based on three different tests because there is no way of knowing which of the three tests (or even a completely new one) this Court will apply.

II. A PUBLIC MEMORIAL FEATURING RELIGIOUS IMAGERY IS NOT A LAW RESPECTING AN ESTABLISHMENT OF RELIGION

A. The Establishment Clause in its Historical Context.

As with all efforts to interpret the meaning of a document, our inquiry into the original meaning of the Establishment Clause must begin with the actual text: "Congress shall make no law respecting an establishment of religion." U.S. CONST. AMEND. I. In order to understand the original public meaning of the Establishment Clause, however, it is important to look at the clause in its historical context. The Framers were not engaged in a merely academic exercise, envisioning grand theories of government disconnected from the realities of life in late

Eighteenth Century America; they were working to address the very real depredations of life, liberty, and property the colonists had suffered at the hands of European autocrats.[4]

The generation of Americans who wrote and ratified the Bill of Rights had spent their youths fighting a long and difficult war of independence against foreign tyranny. That memory still relatively fresh in their minds, those first ten amendments were aimed at preventing a similar, home-grown tyranny from springing up in the new Republic. In this environment, the Church of England was distrusted as an agent of that tyranny, as most of its clergy in America retained loyalist sympathies during the Revolution. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1436 (1990). This fear of malevolent state actors using an established church as a tool of state oppression must have had a profound effect on the founding generation, and helps explain why the Establishment Clause is given its place of prominence as the first clause in the First Amendment to the Constitution.

The Framers were not particularly concerned with the sorts of fine distinctions and multi-part analyses of what constitutes an "endorsement" of or "entanglement" in religion that animate contemporary Establishment Clause debates. The Establishment Clause was included in the First Amendment in order to address a very specific set of problems that existed at the time: namely the *coercive*

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[4] fellow colonists who decided to bring European-style establishmentarianism to the New World.

imposition of a state-established church on unwilling citizens. As Justice Kennedy noted in his dissent in *County of Allegheny*, the Establishment Clause was written with this concern about coercive behavior in mind. 492 U.S. at 659 (1989).

This meaning becomes even more clear when one examines the various drafts of what would become the First Amendment. Madison's original language submitted to the House read: "The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." 1 Annals of Cong. 434 (1789) (Joseph Gales ed., 1790) (emphasis added). The Select Committee—of which Madison was a member—later revised the language to read: "*[N]o religion shall be established by law*, nor shall the equal rights of conscience be infringed." *Id.* at 729 (emphasis added). During House debate, Madison stated that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* at 730. The Senate's final version reported to the House read: "Congress shall make *no law establishing articles of faith or a mode of worship*, or prohibiting the free exercise of religion." *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 151 (Neil H. Cogan ed., 2d ed. 2015) (emphasis added). The House rejected this version, and both houses settled on the language eventually included in the Constitution.

While the exact phraseology changed with each successive version of the Establishment Clause, it is

clear that the underlying purpose was as Madison described it: to ensure that Congress did not establish a national religion that unwilling citizens would be forced to attend, support, and/or conform to. This relatively narrow, even modest, scope of the Establishment Clause is in conflict with the "wall of separation" endorsed by this Court in *Everson*. 303 U.S. at 16.

B. The Phrase "Establishment of Religion" in the Founding Era.

The first edition of Webster's original American dictionary defines the word "establishment" as "the act of establishing, founding, ratifying or ordaining," such as in "[t]he episcopal form of religion, so called, in England." *Establishment*, Webster, *American Dictionary of the English Language* (1st ed. 1828). Working under this definition, it is apparent that, to an educated audience in the years following independence, "an establishment of religion" would have brought to mind an official, state-managed religious organization similar to the Church of England.

That this is what "establishment of religion" would have meant to Americans reading and writing during the late Eighteenth and early Nineteenth Centuries becomes even more clear after examining the way they actually used the term. The Brigham Young University's J. Reuben Clark Law School maintains the Corpus of Founding Era American English, which contains 119,799 texts including "documents from ordinary people of the day, the Founders, and legal sources, including letters, diaries, newspapers, non-fiction books, fiction, sermons, speeches, debates,

legal cases, and other legal materials" dating from 1760 to 1799. BYU Law, Corpus of Founding Era American English, https://lawncl.byu.edu/cofea (last visited December 18, 2018). Searching this database for the phrase "establishment of religion" retrieves 33 results, nearly all of which refer explicitly to the sort of organized, state-backed religious hierarchy exemplified by the Church of England. *See, e.g.*, Henry Caner, *A candid examination of Dr. Mayhew's Observations on the charter and conduct of the Society for the Propagation of the Gospel in Foreign Parts* 32 (1760), https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;rgn=main;view=text;idno=N07328.0001.001 ("[P]oint out to us the passage or passages [in the Massachusetts colonial charter] where in express words a power is granted of instituting an ecclesiastical establishment, or . . . a civil establishment of religion . . . ."); John Leland, *The rights of conscience inalienable, and therefore religious opinions not cognizable by law: or, The high-flying church-man, stript of his legal robe, appears a Yaho* 12 (1791), https://quod.lib.umich.edu/cgi/t/text/text-idx?c=evans;cc=evans;rgn=main;view=text;idno=N18125.0001.001 ("What were, and still are the causes that ever there should be a state establishment of religion in any empire, kingdom, or state? . . . . An over-fondness for a particular system or sect. This gave rise to the first human establishment of religion, by Constantine the Great.").

When one takes the time to read the words of the people who actually lived in the world the Framers inhabited, it quickly becomes clear that "establishment of religion" is not a phrase used in the abstract. The Framers were not dealing in metaphors;

they were not thinking about whether seeing a cross on the side of the road might offend someone's sensibilities; they were talking about the imposition of a state-backed, state-controlled religious hierarchy on unwilling citizens. As Joseph Story wrote in his Commentaries on the Constitution, "[t]he real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1871 (Boston, Hilliard, Gray, & Co. 1833).

C. Evidence from the Early Republic Illuminates How Narrow the Scope of the Establishment Clause Originally Was.

The relatively limited scope of the Establishment Clause's original public meaning can also be seen in the many actions taken by early Congresses that, while evidently not violating the letter and spirit of the Constitution, would almost certainly run afoul of the *Lemon* test. The history of the early Republic is filled with examples of Congress acting in ways that would be interpreted today as "endorsing" religion, both in the form of artistic or monumental objects—as in this case—and in the form of verbal or financial support.

The very first American war memorial, commissioned by Congress and honoring General Richard Montgomery, was placed not in a government building or public park, but in a church: St. Paul's Chapel in New York City. *The General and the Monument*, Trinity Church Wall Street: News & Blogs

(Sept. 19, 2011), https://www.trinitywallstreet.org/blogs/archivists-mailbag/general-and-monument. Both Thomas Jefferson and Benjamin Franklin submitted proposed designs for the Great Seal of the United States that prominently incorporated religious imagery. U.S. Department of State, Bureau of Public Affairs, *The Great Seal of the United States* 2, https://www.state.gov/documents/organization/27807.pdf. The design eventually adopted (and which is also printed on every $1 bill) prominently includes the Eye of Providence within a triangle on the reverse side, *id.*, a Christian symbol representing the Trinity and the all-seeing eye of God. Albert M. Potts, *The World's Eye* 68 (1982).

The mismatch between early congressional practice and the modern interpretation of the Establishment Clause is even more obvious in areas beyond visual iconography. The same Congress that passed the First Amendment also called on President Washington to declare a national day of prayer only days later. *See* George Washington, Proclamation: A National Thanksgiving (Oct. 3, 1789), http://press-pubs.uchicago.edu/founders/documents/amendI_religions54.html. The Continental Congress opened with an invocation by an official chaplain employed by Congress, *see* Reverend Jacob Duché, First Prayer of the Continental Congress (Sept. 7, 1774), https://chaplain.house.gov/archive/continental.html, as has every United States Congress since the ratification of the Constitution. *See History of the Chaplaincy*, Office of the Chaplain, United States House of Representatives, https://chaplain.house.gov/chaplaincy/history.html.

The Capitol itself was used for church services throughout the early Republic, including by the Great Separationist himself, Thomas Jefferson, while he was president. Library of Congress, *Religion and the Founding of the American Republic: Religion and the Federal Government, Part 2*, https://www.loc.gov/exhibits/religion/rel06-2.html. When Congress reenacted the Northwest Ordinance in 1789, it included language stating that "[r]eligion, morality and knowledge bring necessary to good government and the happiness of mankind, Schools and the means of education shall be forever encouraged." The Northwest Ordinance, 1 Stat. 50 (1787).

These are but a few examples of the many ways in which the founding generation did not interpret the Establishment Clause as mandating absolute neutrality from the federal government on religious matters. Early Congresses evidently did not consider many types of direct endorsement of religion to be violations of the Constitution, let alone incidental use of religious imagery placed in a largely secular context. To argue that the maintenance of a cross-shaped war memorial on publicly owned land constitutes an establishment of religion simply does not comport with the historical record. The very men who enacted those words into law expressed no concern whatsoever with the use of explicitly religious imagery on the Great Seal of the United States or the use of the United States House of Representatives as a Christian church. The plain language of the Establishment Clause, combined with evidence from the Constitutional Convention and the verifiable practices of the founding generation, definitively show

that the confusing mish-mash of tests currently making up this Court's jurisprudence are almost completely disconnected from the original public meaning of the Establishment Clause, and must be discarded.

III. UPHOLDING THE FOURTH CIRCUIT'S DECISION WILL HAVE SIGNIFICANT AND WIDESPREAD CONSEQUENCES

A. The Town of Taos's Inextricable Link to the Bataan Death March.

On December 8, 1941, just hours after the surprise attack on Pearl Harbor, Japanese forces invaded the Philippines. The 200th Coastal Artillery Regiment, along with the 192nd Tank Battalion, the 194th Tank Battalion, and regular, national, and commonwealth groups of the Philippine army were assigned the grim task of resisting the invaders.

The members of the 200th Coastal Artillery Regiment were all New Mexicans—members of the New Mexico National Guard—chosen for this duty because the overwhelming majority of the soldiers spoke fluent Spanish. The 200th had evolved from the old 111th Calvary, ordered by the War Department to trade in their horses for anti-aircraft cannons in 1939. The men from the Taos area—sixty enlisted and four officers—made up Battery H.

When the Japanese attack on the Philippines began—before news of Pearl Harbor had even reached the men on the island—the 200th was one of the first American units to engage the enemy and the first to sustain casualties when an early Japanese bomb struck one of its trucks. Over the next few weeks, the

200th fought a delaying action covering the evacuation to the Bataan Peninsula outside Manila, where the Americans and their Filipino allies would attempt to hold the line. In the words of General Wainwright following the end of the war in 1945:

> [t]he 200th Coast Artillery . . . was the first unit in the Philippines, under General of the Army Douglas MacArthur, to go into actions and fire at the enemy, also the first one to go into action defending our flag in the Pacific. First to fire and last to lay down their arms!

Jerry A. Padilla, *Bataan and Its Aftermath: Taosenos Helped Hold the Line*, Ayer Y Hoy en Taos, Fall 2015 Issue 39 at 7–8.

The Japanese forces quickly overwhelmed the defenders, and General MacArthur ordered a strategic withdrawal to Australia. The 200th Coastal Artillery was tasked with manning the artillery batteries guarding the entrance to Manilla Bay—the last defense against the invaders. On May 8, 1942, General Sharp surrendered the defending force. They had held out under constant attack for three months.

The surrender was the beginning of three and a half years of harsh confinement for the Allied survivors, many of whom would lose their lives in the Bataan Death March. The Death March began on April 9, 1942, when the Japanese began sending 60,000 to 80,000 prisoners of war on a 65-mile forced march, during which prisoners were randomly selected for arbitrary executions. The prisoners received little food or water and were frequently tortured. Those who could not keep up were summarily put to death. The predominantly Hispanic

New Mexicans of the 200th were often singled out for special mistreatment, as their Japanese captors were frustrated that they could not always tell the difference between the men of the 200th and the native Filipino soldiers. Of the estimated 80,000 men who began the Bataan Death March, only 54,000 survived to the end.

Upon reaching the overcrowded and ill-equipped prison camps, things were no better. Many prisoners died of disease, and the rest were used as slave labor for years. Those who managed to survive their confinement would not be rescued until near the end of the war, in 1945. For the surviving members of the 200th, memories of their long, brutal captivity, and of the friends they lost, would continue to haunt them even after returning home to New Mexico. Only a handful of veterans from the Bataan Death March are still alive to tell their stories.[5]

B. The Taos Memorial.

The memorial in Taos's town plaza was erected to honor the men who fought and died in these tragic events. It was erected by the War Mothers, a group of women whose children had served during World War II, dedicated in 1960, and paid for exclusively by private donations.[6] The memorial consists of a large bronze cross set into a concrete pedestal. The east face

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[5] For a more thorough account of the Bataan Death March and surrounding events, including first-hand accounts of surviving soldiers, see generally Michael Norman & Elizabeth M. Norman, *Tears in Darkness: The Story of the Bataan Death March and its Aftermath* (2009); Lester I. Tenney, *My Hitch in Hell: The Bataan Death March* (1995).

[6] The government of the Town of Taos was not involved in the fundraising, planning, design, or construction of the Memorial.

of the pedestal contains a plaque bearing the names of those men of Taos County who served in the Battle of Bataan. The west face bears the names of those Taoseños who died in the Battle, on the 65-mile Death March, or in subsequent captivity. The cross is flanked by two flagpoles flying the United States and New Mexican flags, beside a sculpture depicting two soldiers helping a third to keep moving during the Death March.

The memorial sits in the literal center of town, a focal point of the local community, and has been the site of many events honoring the sacrifices of American veterans over the decades, as well as countless private moments of respectful contemplation by visitors and lifelong Taoseños alike. Only half of the young men sent to war from the Taos area ever returned home. The memorial stands as a lasting, tangible reminder of the sacrifices the people of this small desert community made in the name of freedom—all the more important now that the last survivors of Bataan are passing away.

C. Broader Implications.

It is vital that this Court understand the potential ramifications of the Fourth Circuit's reasoning when it declared the Bladensburg Cross a violation of the Establishment Clause. The Town of Taos has been threatened with lawsuits similar to the one giving rise to this current controversy, and a failure by this Court to overturn the Fourth Circuit's erroneous decision would virtually guarantee Taos would be drawn into costly and unjust litigation to remove its memorial from its place in the town plaza. And it likely would lose, should this Court adopt the Fourth Circuit's

reasoning that large cross-shaped sculptures on public property are *per se* violations of the Establishment Clause.

As demonstrated in Part II, *supra*, the installation of a cross as part of a memorial to those who gave their lives in the service of their country does not constitute a government establishment of religion as that language was understood at the time of ratification. Religious imagery has been an important source of inspiration and symbolism in American public art since before the dawn of the Republic. Under the Fourth Circuit's reasoning, however, important monuments all across the country—like the Taos memorial—are imperiled.

The many thousands of grave markers bearing crosses in Arlington National Cemetery would arguably be unconstitutional, as would much of the art in the federal buildings throughout Washington, D.C.,[7] as would practically any object on which the Nation's motto, "In God we Trust," is emblazoned, potentially including even the wall above the rostrum in the U.S. House of Representatives and most, if not all, American currency. *See* U.S. House of Reps., History, Art & Archives, What's in the Capitol?, House Chamber Furniture, http://history.house.gov/Exhibitions-and-

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[7] See, e.g., John Gadsby Chapman, *The Baptism of Pocahontas* (1839), *in* Architect of the Capitol, ExploreCapitol Hill, http://www.aoc.gov/capitol-hill/historic-rotunda-paintings/baptism-pocahontas; Robert W. Weir, *Embarkationof the Pilgrims* (1843), *in id.*, http://www.aoc.gov/capitol-hill/historic-rotunda-paintings/embarkation-pilgrims; Boardman Robinson, *Jesus* (2007), Library of Congress Prints & Photographs OnlineCatalogue, https://www.loc.gov/pictures/item/2010720202/.

Publications/House-Chamber/Rostrum/.
Furthermore, as Judge Newsom observed in his concurrence in a similar cross-shaped monument case before the Eleventh Circuit last May, many beloved and historic monuments around the country would also be at risk of being torn down. *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1180–82 (11th Cir. 2018) (Newsom, J., concurring in the judgment) (collecting examples of cross memorials across the country).

The Seventh Circuit succinctly has explained why such a result would be contrary to the original public meaning of the First Amendment: "the Establishment Clause does not mandate the eradication of all religious symbols in the public sphere." *Mayle v. United States*, 891 F.3d 680, 684 (7th Cir. 2018) (citing *Salazar v. Buono*, 559 U.S. 700, 718 (2010)), *cert denied*, No. 18-583 (Nov. 5, 2018). Indeed, in *Mayle*, the Seventh Circuit grappled with the use of the motto "In God We Trust" on the Nation's currency, and concluded that it passed constitutional muster. Much like Congress's use of a motto that "acknowledg[es] an aspect of our nation's heritage," *id.* at 687, so too here does government maintenance of the Bladensburg Peace Cross acknowledge and honor the American values for which so many lost their lives during World War I. The shape of the monument chosen to embody those values does not contravene its fundamentally American message.

In any case, "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014). A memorial to the fallen, speaking in solemn and near-universally understood

symbolic language, is simply not the first step in Maryland establishing a state religion. By failing to repudiate the reasoning of the Fourth Circuit decision declaring otherwise, this Court would not only be ignoring the original public meaning of the Establishment Clause, but would also be declaring open season on innumerable memorials, monuments, and other objects and structures of immense cultural and historic value.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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